82-1788

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

NO. .....

ALABAMA POWER COMPANY,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Section 105c of the Atomic Energy Act requires the Nuclear Regulatory Commission ("NRC"), prior to granting a license to operate a nuclear generating facility, to determine whether the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ." Pursuant to this authority, NRC found that granting an unconditional license to Alabama Power Company ("APCO") to operate the Joseph M. Farley Nuclear Power Plant ("Farley Plant"), would "maintain" such a situation and ordered APCO to offer to share its sole ownership in the Farley Plant with its principal competitor, Alabama Electric Cooperative, Inc. ("AEC").

APCO appealed to the United States Court of Appeals for the Eleventh Circuit and asserted that NRC had misapplied settled antitrust principles. The Eleventh Circuit held that NRC need not apply those principles in conducting its Section 105c review. It also affirmed NRC's requirement of joint ownership, which, while "extreme," was justified in order to extend AEC's tax and financing advantages. This case of first impression presents the following questions:

1. Does Section 105c require the application of traditional antitrust principles?

2. Does Section 105c require a causal relationship between the "activities under the license" and the maintenance of any "situation" alleged to be inconsistent with the antitrust laws?

3. Where NRC purported to apply traditional antitrust principles, did the Court of Appeals err in affirming on the different rationale that those principles do not apply in Section 105c proceedings?

4. Did the Court of Appeals err in affirming the remedy of mandatory joint ownership with APCO's principal competitor for the express purpose of extending AEC's tax and financing advantages?

PARTIES TO THE PROCEEDING BELOW

APCO is an Alabama corporation engaged in the sale of electricity at wholesale and retail in the State of Alabama.* Respondents United States Nuclear Regulatory Commission and the United States Department of Justice ("DOJ") are statutory parties to prelicensing antitrust review proceedings at NRC. There were two intervenors below: Alabama Electric Cooperative, Inc. ("AEC"), an electric generation and transmission cooperative organized under Alabama law, and the Municipal Electric Utility Association of Alabama ("MEUA"), an unincorporated association of twelve cities or municipal utility boards.

*APCO is a wholly-owned subsidiary of The Southern Company, a registered utility holding company under the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79. The Southern Company also holds all the outstanding common stock of Georgia Power Company, Gulf Power Company and Mississippi Power Company. Southern Company Services, Inc. is a wholly-owned service company of The Southern Company. Southern Electric International, Inc. is also a subsidiary of The Southern Company.

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MISCELLANEOUS

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Petitioner Alabama Power Company ("APCO") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming a decision of the Nuclear Regulatory Commission ("NRC" or "Commission").

OPINIONS BELOW

The decision of the Court of Appeals is reported at *Alabama Power Co. v. Nuclear Regulatory Commission,* 692 F.2d 1362 (11th Cir. 1982), and is annexed hereto as Appendix A. The decision affirms an NRC decision reported in four separate orders and opinions. The Atomic Safety and Licensing Appeal Board ("ALAB") decision, *In re Alabama Power Co.,* ALAB-646, 13 NRC 1027 (1981), annexed hereto as Appendix C,

modified and affirmed two decisions of the Atomic Safety and Licensing Board ("LB") of the NRC. The LB decision on liability is reported at *In re Alabama Power Co.*, LBP-77-24, 5 NRC 804 (1977) and that on remedy at *In re Alabama Power Co.*, LBP-77-41, 5 NRC 1482 (1977). The former LB decision is annexed hereto as Appendix D and the latter as Appendix E. The full Commission declined discretionary review of the ALAB decision in a memorandum and order reported at *In re Alabama Power Co.*, CLI-81-27, 14 NRC 795 (1981) and annexed hereto as Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit is dated and was entered on December 6, 1982. Petitioner timely filed a Petition for Rehearing and Rehearing *en banc* with the United States Court of Appeals for the Eleventh Circuit, which Petition was denied by Order entered February 2, 1983. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of sections 105a, 105c(5) and 105c(6) of the Atomic Energy Act of 1954, as amended in 1970 ("Act"). 42 U.S.C. §§ 2135(a), 2135(c)(5), 2135(c)(6). The complete text of Section 105 is annexed hereto as Appendix B.

STATEMENT OF THE CASE

In 1969, APCO filed its initial application with the NRC for licenses to construct and operate the Farley Plant.[1] In December 1970, Congress amended Section 105c of the Act. That sec-

[1]The necessity and desirability of the Farley Plant had been previously determined by the State of Alabama when, after public hearings, the Alabama Public Service Commission ("APSC") determined that a certificate of convenience and necessity should be issued based on a demonstration that the Farley Plant was needed to assure the adequacy and reliability

tion requires NRC, as part of its review of all such applications, to consider whether the applicant's "activities under the license would create or maintain a situation inconsistent with the antitrust laws" specified in Section 105a of the Act.[2] 42 U.S.C. §2135(c)(5). Pursuant to these amendments, the NRC, in 1971, embarked on an antitrust review of APCO's application. Some 10 years later, following exhaustive evidentiary hearings and lengthy decisions by two NRC subsidiary tribunals, the NRC's antitrust review culminated in a finding that APCO's activities under the license would "maintain a situation inconsistent with the antitrust laws." Based on this finding, the NRC imposed upon APCO an extensive and burdensome set of antitrust license conditions, including a requirement that it offer an ownership share of the Farley Plant to Alabama Electric Cooperative ("AEC"), APCO's principal competitor.

The proceedings at the NRC encompassed virtually every aspect of APCO's activities from the early 1940s until the 1970s. Ultimately, the NRC based its action upon its findings of seven instances of conduct on the part of APCO which it termed inconsistent with the antitrust laws. None of these, except for APCO's failure voluntarily to share ownership of the Farley plant with AEC, occurred after early 1972. Indeed, most of the "instances" terminated long before.

1. The LB Hearings

Hearings on APCO's application commenced before the LB of NRC in December 1974 and ended in May 1977. The LB purported to conduct the hearings under traditional legal standards applicable to monopolization cases under section 2 of the Sherman Act.[3]

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of APCO's electric system. *See* APSC Dkt. No. 16204, dated August 24, 1969, and supplemented September 11, 1970, APCO's Exhibit JMF-50.

[2]Section 105a lists the following statutes: Sherman Act, 15 U.S.C. §§ 1-7; Wilson Tariff Act, 15 U.S.C. §§ 8-11; Clayton Act, 15 U.S.C. §§ 12-27; and the Federal Trade Commission Act, 15 U.S.C. §§ 41-49. 42 U.S.C. § 2135(a).

[3]The ALAB characterized the LB's findings as those of "monopolization." 13 NRC at 1045.

The LB concluded that APCO and AEC competed in a relevant market for the sale of electric power at wholesale.[4] The geographic scope of the market was found to be APCO's service territory. Based on APCO's share of that market, its ownership of transmission lines and generating capacity, and its conduct, LB concluded that APCO had monopoly power therein. 5 NRC at 898-901.

The LB then reviewed a "multitude" of allegations of anticompetitive conduct, *id.* at 1490. LB found "but five instances of conduct on the part of Applicant which can be termed inconsistent with the antitrust laws" beginning in the early 1960's and ending in "early 1972." *Id.*

The LB "found no evidence that indicated conduct on the part of Applicant which is inconsistent with the antitrust laws beyond early 1972." 5 NRC at 1490. It then noted that none of the condemned conduct had "caused any appreciable increase in Applicant's preexisting size or market dominance." 5 NRC at 1503. "[T]he facts in this case . . . show that Applicant's market dominance which had been achieved by 1962 was not a 'market that has been closed by defendants' illegal restraints,' nor the result of an illegal 'combination' of defendants engaged in predatory conduct." *Id.* at 1502 (footnotes omitted). LB also found that APCO had expanded its generating capacity "to fulfill periodic load projections, not to preclude or hinder competition" and that its "transmission lines were extended to supply customer needs for electricity, not to victimize AEC or others." *Id.*

Pursuant to Section 105c(6), the LB then ordered unit power access for AEC in the Farley Plant, i.e., a right to purchase a proportionate share of its output.[5] The LB considered but rejected a joint ownership remedy primarily because of the absence of Congressional desire to order a sole nuclear plant

[4]LB rejected proffered retail and regional power exchange markets.

[5]"Unit power" is "power purchased on a contractual basis in the form of a percentage share of the output from a particular power plant. The cost of unit power includes the owner's cost of capital, costs of construction, cost of fuel and operation, and a rate of return on investment." 13 NRC at 1082.

owner to share ownership "with a competitor". *See* 5 NRC at 1496.[6]

2. The ALAB Decision

All parties appealed to ALAB. In June 1981, ALAB affirmed in part, but also modified in significant respects, the LB decision. ALAB found *three* relevant markets and that APCO had monopoly power in each. Although ALAB affirmed LB's findings of anticompetitive conduct, ALAB believed that the pattern of such conduct was wider in scope than the LB found, and that the pattern began in 1941 when APCO lowered its wholesale rates and continued through an APCO failure to offer AEC a joint ownership interest in the Farley Plant. 13 NRC 1077, 1084.

ALAB observed that APCO had a "history of legal opposition to AEC generation." 13 NRC at 1080. In view of this opposition, and because the effect of APCO's rate reductions was "to forestall AEC from installing its own generating capacity," ALAB concluded that APCO improperly intended "to avoid competition." *Id.* at 1080-81. ALAB did so despite the fact the Rural Electrification Administration ("REA"), AEC's source of financial assistance, believed that AEC's construction would involve an unnecessary duplication of APCO generating capacity, *id.* at 1080, and encouraged the rate reductions, 5 NRC at 910. ALAB refused to consider the fact that the rate reductions were encouraged or approved by APSC in the exercise of its regulatory powers over APCO. *Id.* at 908-11.

Similarly, ALAB concluded the failure to offer joint ownership was improper because the Farley Plant would increase APCO's market dominance, 13 NRC at 1105, and because APCO was motivated by its concern that sharing in the ownership of the plant "would lead to erosion" of its "wholesale and retail business." *Id.* at 1085.

ALAB then fashioned its license conditions without regard for those ordered by LB because of ALAB's view of the "situa-

[6]The LB, however, noted other compelling reasons for not requiring joint ownership between APCO and AEC. *See* 5 NRC at 907, 960-61.

tion inconsistent with the antitrust laws." 13 NRC at 1097. ALAB rejected unit power access in favor of joint APCO-AEC ownership of the Farley Plant. Joint ownership was termed "the most effective way" to forestall an increase in APCO's dominance because "[a]s a part-owner, AEC will be able to take advantage of the lower interest and tax benefits available to it for financing its share . . . of the output from Farley." *Id.* at 1105.[7]

APCO sought discretionary review of the ALAB decision from the full NRC. On October 22, 1981, that petition was denied. 14 NRC at 795.

3. The Decision of the Court Below

APCO appealed NRC's decision to the United States Court of Appeals for the Eleventh Circuit.

APCO argued to the court below that NRC had misapplied certain established antitrust principles in its analysis of APCO's past conduct. Specifically, APCO contended that NRC improperly failed to recognize APCO's right, as a dominant firm, to engage in legitimate competitive activity. Additionally, APCO argued that NRC had erroneously refused to recognize and assess the impact of state and federal regulation on APCO's market position and behavior.[8]

APCO also argued to the court below that NRC had erred by predicating license conditions on conduct which terminated many years prior to the license proceeding and which bore no causal connection to the activities licensed by NRC.

Finally, APCO contended that the joint ownership remedy ordered by NRC was neither appropriate under Section 105c nor consistent with antitrust policy.

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[7]AEC, historically and presently, receives its financing principally through direct loans or loan guarantees from the federal government (REA) and is exempt from federal income taxes.

[8]NRC dismissed APCO's claims that it had acted pursuant to articulable concerns of regulatory policy as an attempt "to put in different clothing a time-worn and discredited argument that seeks to justify immunity from the antitrust laws." 13 NRC at 1040. According to APCO, NRC's refusal to consider regulation other than in the context of immunity was contrary to settled antitrust precedent.

The court below disposed of APCO's claims that NRC had misapplied settled antitrust principles on the grounds that Section 105c neither "calls for or allows a traditional antitrust analysis" and that "[settled antitrust] principles simply do not apply in the usual way to nuclear power regulation." 692 F.2d at 1368, 1369. Accordingly, the court refused to review the antitrust standards applied by NRC and simply affirmed NRC's conclusions. *Id.* at 1369.

The court below also rejected APCO's claim that Section 105c does not allow NRC to premise liability on conduct that is unrelated to the licensed facility. The court approved NRC's condemnation of unrelated conduct occurring "many years, even decades, prior" to the license proceeding, *id.* at 1365, with the statement that the statute directs "NRC to take a careful look at the present – and the past – to see if an anticompetitive climate exists and to see if applicant has acted in an anticompetitive manner." *Id.* at 1367-68.

Finally, although characterizing the joint ownership remedy as "extreme," the court approved both the remedy and NRC's rationale for imposing it: "Here the NRC has given the AEC ownership access to the new nuclear plants which will . . . allow the AEC to take advantage of congressionally conferred tax and other breaks it has as a rural electricity provider." *Id.* at 1369.

APCO petitioned for Rehearing and for Rehearing *en banc*. By order entered February 2, 1983, the petition was denied.

ARGUMENT

I.

The Questions Presented Are Of Exceptional Public Importance.

"There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission,* No. 81-1945, slip op. at 28 (U.S. Sup. Ct. Apr. 20, 1983). Unless reviewed, the decision below will frustrate that purpose and will pose a new

and substantial disincentive to the development of nuclear power by private enterprise.

An electric utility's choice between nuclear and non-nuclear generating plants is likely to be significantly affected by the Eleventh Circuit's construction of Section 105c. It is clear from the debates preceding Section 105c that the decision of Congress to subject nuclear license applicants to prelicensing antitrust review was not calculated to discourage private development of nuclear power.[9] Yet the decision of the court below does just that. It exposes utilities which choose the nuclear option to condemnation for conduct otherwise compatible with traditional antitrust principles.[10]

The Eleventh Circuit's refusal to require NRC to apply the antitrust principles developed by the federal courts and the Federal Trade Commission ("FTC") leaves NRC's antitrust authority insulated from judicial review. If this Court does not exercise its discretion to review the decision of the court below, it will enable NRC to continue its practice of forcing nuclear license applicants to accept antitrust license conditions framed

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[9]*See* text *infra* at 10 (statement of Richard W. McLaren).

[10]An investment decision made today would not likely bring a nuclear plant into operation before 1995. The Department of Energy recently noted that for plants entering operation in 1995, the comparative costs of coal and nuclear power plants are "in a virtual dead heat in most regions of the Country." I *Projected Costs of Electricity from Nuclear and Coal-Fired Power Plants*, DOE/EIA 03561 at xviii (1982) (hereinafter "DOE Report"); see also *id.* at 1. Mr. Mayben, a DOJ economic expert in the proceedings below, explained that relief such as that ordered in this case would likely tip this balance in comparative costs against nuclear:

> Q. [Dr. Elzinga] Are the relative costs in economic situations such as between different types of plants that in the near future utilities such as Alabama Power Company might decide not to go with a nuclear facility if they're aware that the license conditions which you seem to be recommending would apply to that facility . . . but would not apply to a non-nuclear facility? That is, are we enough on the margin that this could tip the decision against nuclear?
>
> A. [Mr. Mayben] Yes. I think we are.

TR. 27855-56. *Accord*, Transcomm, Inc., *The Nuclear Regulatory Commission's Antitrust Review Process: An Analysis of the Impacts* (Draft June, 1981), DOE Contract No. DE-AC01-79PE-70025 (hereinafter "Transcomm").

and imposed without regard for the applicant's defenses under settled antitrust laws. This case is the *only* NRC antitrust review case which has been fully litigated through the Commission and appealed to the courts.[11]

Nor will the impact of the decision below be confined to matters controlled by the Atomic Energy Act. Section 105c's statutory language, "create or maintain a situation inconsistent with the antitrust laws," is found in at least seven other federal statutes and has never been construed by this Court.[12] The Eleventh Circuit's construction of this statutory phrase will have important precedential effect in a number of other industries.

Finally, this case raises important questions about the role of government subsidies in the process of competition. By approving NRC's joint ownership remedy for the express purpose of extending federal tax and financing advantages available to APCO's competitor, the court below has sanctioned a remedy which is antithetical to the competitive policy embodied in the antitrust laws.

The Department of Energy has projected that by the year 2000, nuclear power should double its current contribution to the nation's electricity energy needs. *See* II *Projected Costs of Electricity from Nuclear and Coal-Fired Power Plants,* DOE/EIA 0356/2, at 21 (1982). The decisions to build this projected capacity are being made now and require a clear answer concerning the nature and scope of NRC antitrust review. This case presents the Court with an opportunity to provide that answer.

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[11]In all future applications the applicant will *not* have available the "grandfathered" status provided by Section 105c(8) of the Atomic Energy Act which was available to APCO in this proceeding because its application was on file with NRC prior to the December 19, 1970 amendment of the Act. 42 USCS § 2135; 5 NRC at 1498. See Transcomm, at 12-13, where it is pointed out that the NRC antitrust review process in practice "forces concessions from the applicant utilities without a full debate on the merits of antitrust issues which may be relevant."

[12]*See* The Outer Continental Shelf Lands Act, 43 U.S.C. § 1337; The Northeast Rail Service Act, 45 U.S.C. § 767; The Federal Property and Administrative Services Act, 40 U.S.C. § 488; The Naval Petroleum Reserves Production Act, 10 U.S.C. § 7430; The Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1413; The Mineral Leasing Act, 30 U.S.C. § 184; National Aeronautics and Space Administration Authorization Act, 35 U.S.C. § 209.

II.

The Court Below Has Erroneously Construed An Important Federal Statute.

A. The Lower Court's Refusal to Consider Assignments of Antitrust Error Was Based on a Misreading of Section 105c.

Section 105c(5) refers to antitrust law as the standard against which NRC is to judge activities of a license applicant. The court below recognized as much by characterizing the facts and issues before it in antitrust terms.[13] But, when APCO argued that NRC misapplied traditional antitrust principles, the court declared that settled antitrust principles "simply do not apply in the usual way to nuclear power regulation" and that Section 105c does not call for or allow "traditional antitrust analysis." 692 F.2d at 1368, 1369. This construction cannot be squared with the language of Section 105c, its legislative history, or NRC's own previous construction of the statute.

1. Section 105c Requires NRC to Conduct its Antitrust Review in Accordance with the Antitrust Principles Developed by the Courts and the Federal Trade Commission

Section 105c(5) requires NRC to determine whether the activities under the license will "create or maintain a situation inconsistent with the antitrust laws" specified in Section 105a. The statute thus requires NRC to apply the antitrust principles developed under the Sherman, Clayton and Federal Trade Commission Acts. Congress' explicit reference to these antitrust statutes indicates that NRC must apply existing antitrust principles.

The legislative history of Section 105c confirms that Congress did not authorize NRC to depart from the antitrust principles established by the courts and the FTC. The Joint Committee on Atomic Energy, the legislative panel that drafted

[13] *See, e.g.*, 692 F.2d at 1368 ("The amount of market power held by the applicant and the ways it has been used are relevant inquiries . . .").

Section 105c, specifically stated in its report to Congress that the "phrase 'inconsistent with the antitrust laws' was intended to be the equivalent of actual violation of the antitrust laws." H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., *reprinted in U.S. Code Cong. & Ad. News*, 4981, 4991 (1970) ("Joint Committee Report").

The decision of Congress to require application of traditional antitrust principles in the nuclear licensing process represented a compromise between two extreme views. The Joint Committee Report reveals that:

> . . . there are those who point out that it is unreasonable and unwise to inflict upon the construction and operation of nuclear power plants and the AEC [now NRC] licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation *but also to further such competitive postures, outside the ambit of the provisions of the antitrust laws, as the Commission might consider beneficial to the free enterprise system.* The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

Joint Committee Report at 4994 (emphasis added). Congress satisfied its concern with the consequences of unrestricted commercial usage of nuclear facilities not by dispensing with a traditional antitrust review, but by subjecting nuclear power plant licensees to traditional antitrust review at the prelicensing stage. The compromise was one of timing.

The Justice Department's ("DOJ") support for the application of traditional antitrust standards was expressed by Assistant Attorney General McLaren who testified that "[w]e do not think that the effect of any of the bills before the Committee would be to subject utilities which use nuclear power to a more stringent substantive antitrust standard of *violation* of the law than that applicable to other utilities." *Prelicensing Antitrust Review of Nuclear Powerplants: Hearings before the Joint*

Committee on Atomic Energy, 91st Cong., 1st Sess. at 143 (1969) (hereinafter "Hearings Pt. I" or "Hearings Pt. II") (statement of Richard W. McLaren). Mr. McLaren advised against a more stringent standard:

> We think it important that a utility's choice between fossil generation and nuclear generation not be affected by considerations of substantial differences in the burden of satisfying antitrust policies. We believe that a system of prelicensing antitrust review need not and will not introduce any such artificial factor in the choice.

Id. at 148.

Consistent Commission precedent also establishes that NRC's mandate under Section 105c is to conduct a traditional antitrust analysis. In *Houston Lighting & Power Co.*, CLI-77-13, 5 NRC 1303, 1316 (1977), the Commission stated:

> Nuclear power is an area of considerable technical complexity. Its governance should be entrusted to an agency which embodies that particular expertise. But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry.

In other proceedings under Section 105c, NRC's lower boards have also purported to apply settled antitrust principles. *See* ***Toledo Edison Co.,*** ALAB-560, 10 NRC 265, 272 (1979) ("[Section 105c] invokes traditional antitrust statutes, *i.e.*, the Sherman, Clayton, and FTC Acts. The Commission must 'apply principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to [the nuclear] industry'."); *see also Florida Power & Light Co.*, ALAB-665, Nuc. Reg. Rep. (CCH) ¶30,658 (Jan. 29, 1982).

The Eleventh Circuit misunderstood the compromise that Congress reached. The court's assertion that traditional antitrust standards have no bearing on Section 105c proceedings is both contrary to precedent and in need of review.

2. The Lower Court's Construction of Section 105c was Based on a Misunderstanding of the Legislative History.

Contrary to the plain language of the statute, the court below refused to review NRC's findings of APCO's past anticompetitive conduct according to traditional antitrust standards. The court relied upon an isolated passage from the Joint Committee Report to reach this conclusion:

> "The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in [Section 105c]; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying those laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, *when the license is issued or thereafter,* be inconsistent with any of the antitrust laws or the policies clearly underlying these laws."

692 F.2d at 1368 (quoting Joint Committee Report at 4994) (emphasis added). The court's error lay in its interpretation of the phrase "reasonable probability of contravention of the antitrust laws." Congress employed the concept of reasonable probability to guide the NRC in making its prediction under Section 105c. As the Joint Committee's use of the phrase "when the license is issued or thereafter" indicates, the standard of reasonable probability looks not to past conduct, but to future competitive effects.

The "reasonable probability" standard merely lowers the quantum of proof needed to show that licensed activities would, at the time the *license is issued or thereafter,* create or maintain a situation inconsistent with the antitrust laws.[14] The framework of NRC's analysis remains a traditional antitrust one.

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[14]*Consumers Power Co.*, ALAB-452, 6 NRC 892, 926 (1977) ("*Midland*").

The Joint Committee chose the standard of "reasonable probability" to convey the meaning given to that phrase in the context of the Clayton Act. According to the Joint Committee:

> It is important to note that the antitrust laws within the ambit of subsection 105c. of the bill are all the laws specified in subsection 105 a. These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in Section 5 of the Federal Trade Commission Act, as amended that "Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful."
>
> The committee is well aware of the phrases "may be" and "tend to" in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress — namely, reasonable probability. The committee has — very deliberately — also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105 c. of the bill.
>
> The committee did not deem it advisable to extend the boundaries of the considerations to be taken into account by the Commission beyond the antitrust laws and the policies clearly underlying those laws.

Joint Committee Report at 4994-95. *See Consumers Power Co.*, ALAB-452, 6 NRC 892, 926 (1977). Like Section 105c, the Clayton Act calls for a *prediction* of the probable anticompetitive effects of a proposed transaction. Recognizing that it is impossible to predict future effects on competition with absolute certainty, courts applying the Clayton Act have relied on the concept of reasonable probability. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 323 n.39 (1962). In like manner, Congress authorized NRC to make its prediction under Section 105c according to the standard of reasonable probability. But the court below improperly relied on the concept of reasonable probability to justify its conclusion that NRC need not apply traditional antitrust principles when analyzing an

applicant's *past* conduct. The court below misunderstood the quoted passage from the Joint Committee Report.[15]

Finally, the court erroneously assumed that consideration of the policies underlying the antitrust laws calls for an analysis different from a traditional antitrust scheme. 692 F.2d at 1368. But as Professors Areeda and Turner have noted,

> . . . nothing in the Sherman or Clayton Acts prevents the courts from doing what ought to be done to implement sound antitrust policies. Sound analysis under the Sherman and Clayton Acts can, should, and does take account of all relevant antitrust policies suitable for non-legislative implementation.

P. Areeda and D. Turner, II *Antitrust Law* § 307f (1978). Moreover, the court failed to explain why the antitrust principles invoked by APCO (but ignored by ALAB) are not part of the "policies" underlying the antitrust laws. The Joint Committee's reference to "the policies clearly underlying the antitrust laws" in no way absolves NRC of its obligation to apply basic antitrust principles.

3. The Court's Failure to Apply Traditional Antitrust Principles was Not Harmless Error.

The holding of the court below that Section 105c neither calls for nor allows a traditional antitrust analysis is not harmless error. APCO's ability to defend was undercut first by the

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[15]After concluding that NRC is to look only for reasonable probability of a violation of the antitrust laws, the court declared that "[t]his command may result in the conditioning of licenses in anticipation of situations which *would not*, if left to fruition, in fact violate any antitrust law." 692 F.2d at 1368 (emphasis added). This statement stands in stark contrast to the concept of reasonable probability in the Clayton Act. It has long been established that the Clayton Act only proscribes restraints of trade which *would*, if left to fruition, violate the antitrust laws. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n. 39 (1962).

The court apparently accepted NRC's condemnation of APCO's past conduct because of the uncertainty inherent in the prediction of the future that Section 105c contemplates. After noting the difficulty of making a prediction, it said: "Congress did not intend that the NRC limit its concerns to activities which are mature violations of the antitrust laws." 692

ALAB's ignoring its antitrust defenses and subsequently by the court's ruling that such defenses were irrelevant. The antitrust principles advanced by APCO would have compelled a substantially different analysis of the conduct that ALAB condemned. They also would have compelled a determination that the impact of federal and state regulation on APCO's market shares, its prices and its power to exclude competition negated ALAB's monopoly power findings affirmed by the court below. *Mid-Texas Communications Systems, Inc. v. AT&T*, 692 F.2d at 1369.

The holding of the court below makes irrelevant the impact of regulation on APCO's power to control prices or to exclude competition. ALAB, contrary to principles of antitrust law, predicated its finding of monopoly power on APCO's share of electric sales in its service area and its ownership of the majority of generating capacity and transmission lines in that area, without consideration of the statutory and regulatory mandates placed on APCO to provide such service and construct facilities to do so.[16] ALAB ignored the extent to which APCO has been required to expand its system to fulfill its government-imposed obligations as a public utility.

ALAB excused its rejection of the impact of regulation on APCO's market position and conduct by concluding that, since regulation offered no immunity from the antitrust laws, it need not be considered. Thus ALAB stated:

> What the argument [relating to the necessity of considering the impact of extensive regulation in evaluating APCO's actual power to raise prices or exclude competition] boils down to . . . is that government regulation somehow serves to relieve the activities from close scrutiny under the antitrust laws.

F.2d at 1368. Assuming this statement is correct, it does not address how NRC should analyze the past, when past conduct is being used as a basis for NRC's prediction. APCO contended that its past conduct should have been analyzed under "the analysis developed in the judicial interpretation of the antitrust statutes incorporated into the Atomic Energy Act." *Id.*

[16]Ala. Code §§ 10-4-321; 37-1-49; 16 U.S.C. §§ 812, 813, 824a, 824e, 824i, 824j, 824k.

13 NRC at 1042. In dismissing the impact of regulation on APCO's market power, LB stated:

> This means that the market analysis in this proceeding is unaffected by the performance, good or bad, pervasive or sketchy, of regulatory agencies controlling the economic behavior of Applicant, its rivals or its customers. Nor need we reach any judgment as to the efficacy of this regulation.

5 NRC at 885; *id.* at 884.

The court below refused to consider the error of NRC's announced refusals to assess the impact of regulation on a finding of monopoly power. This refusal was based on the mistaken notion that traditional antitrust standards need not be applied; including the principle that even where regulation provides no immunity from the antitrust laws, the impact of regulation must be considered in determining the fact of monopoly power as well as the character of conduct being assessed.[17]

ALAB also refused to admit the possibility that regulatory factors bearing on APCO's conduct could affect its determination of the existence of intent to monopolize. For instance, despite conceding the presence of REA pressure upon APCO to lower its wholesale rates in the 1940s, ALAB refused to acknowledge the consequence that REA's policy had the effect of mitigating APCO's alleged predatory intent. *See* 13 NRC at 1080-81. Further, ALAB denied, by its silence, the significance of the approval by the Alabama Public Service Commission

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[17]*See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974); *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372, 1385-90 (5th Cir.), *cert. denied sub nom. Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.*, 449 U.S. 912 (1980); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 737-38, 741-43 n.66 (9th Cir. 1981); *MCI Communications Corp. v. AT&T*, No. 80-2171, slip op. (7th Cir. January 12, 1983); *Southern Pacific Communications Co. v. AT&T*, 556 F.Supp. 825, 972-78 (D. D.C. 1983) (cases cited therein). The reference to *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932), the only case cited by the court below, overlooks the distinctive character of a regulated utility with a continuing duty to serve those within its service area at rates and conditions set by a public agency.

("APSC") of these rates,[18] and the impact of APSC's ratemaking authority on APCO's ability to recoup any short term losses resulting from rate reductions. *See Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 89 (2d Cir. 1981).

The wholesale rate reductions made by APCO in 1941, 1946 and 1950 found to be anticompetitive by ALAB, 13 NRC at 1077, were consistent with APCO's decreasing costs; a product of negotiations with REA (which was seeking reduced rates on behalf of rural electric cooperatives); and approved by the APSC which was then exercising jurisdiction over wholesale rates.[19] ALAB determined that such justifications for the rate reductions were "merely another version of the regulated industry defense" which ALAB had excluded. 13 NRC 1081, 1039-1042. By not requiring application of traditional antitrust laws, the court erred.

NRC rejected consideration of the impact of regulation on the 1968-72 negotiations for expanded interconnections between APCO and AEC. This rejection eliminated APCO's defenses that the negotiations were initiated by the FPC at the foot of a complaint proceeding in which AEC complained that interconnections with APCO were inadequate and that the rates charged by APCO were too high. Such negotiations were conducted in large part with participation by the staff of FPC which had jurisdiction over the subject matter of the negotiations under Section 202(b) and Section 206 of the Federal Power Act. 16 U.S.C. 824a(b), 824e(b).[20] These negotiations

[18]In contrast to ALAB, LB had acknowledged the existence of APSC regulation, 5 NRC at 909, in finding that the rate reductions were not anticompetitive. Currently, the Federal Energy Regulatory Commission ("FERC") exercises authority over wholesale rates. *See FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964); *Alabama Electric Cooperative, Inc. v. Alabama Power Co.*, 38 FPC 962 (1967).

[19]*See Alabama Power Co.*, 83 PUR3d 321, 348-49 (1969), a proceeding before the APSC, where that commission described its historical regulation of wholesale for resale rates, including sales to electric cooperatives.

[20]This Court has previously discussed the functions of interconnections and coordinated operations in the electric power business. *See generally Gainesville Utilities Department v. Florida Power Corp.*, 402 U.S. 515, 517-21 (1971). *See also Alabama Electric Cooperative, Inc. v. Alabama Power Co.*, 38 FPC at 976.

involved concerns over regulatory policy similar to those reflected in *Mid-Texas Communication Systems, Inc. v. AT&T*, 615 F.2d at 1376-77, 1385-90, which involved interconnection negotiations under Section 201 of the Communication Act of 1934, 47 U.S.C. § 201. Failure of the court below to require NRC to consider these regulatory concerns is not harmless.

The other conduct findings identified by ALAB and sanctioned by the lower court ignored the impact of regulation which provided justification for APCO's conduct. Contrary to traditional antitrust principles, ALAB and the lower court rejected this justification. In so doing, the court sanctioned a conclusion of law that conduct devoid of anticompetitive intent could form a basis for inconsistency with Section 2 of the Sherman Act.[21]

Moreover, it is now well settled that "a large firm does not violate § 2 simply by reaping the competitive . . . gains that may accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Yet ALAB and the court below refused to consider application of this principle. Under this principle, ALAB could not properly have condemned APCO's failure to offer joint ownership to AEC, nor could the court below have simply deemed it irrelevant.

APCO is entitled to consideration of these claims by the fact finder. The court below abdicated its responsibility by simply reading these principles of antitrust law out of Section 105c. A remand is required to assure review of NRC's findings under traditional antitrust principles. This Court should not leave in effect the Eleventh Circuit's abdication of the federal judiciary's responsibility to act as overseer of the antitrust laws.

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[21]ALAB held APCO's 5-year all-requirements contracts and Section 4.2 of the SEPA contract to be part of an unlawful pattern despite a finding that APCO lacked anticompetitive intent. *See* 5 NRC at 932. Mere monopoly power, absent an intent to monopolize, is no basis for Section 2 liability. *See Florida Power & Light Co. v. FERC*, 660 F.2d 668, 679 n.27 (5th Cir.-B 1981); *United States v. Griffith*, 334 U.S. 100, 105 (1948).

B. The Court Below Failed to Require NRC to Demonstrate a Link Between the Licensed Activities and APCO's Allegedly Anticompetitive Conduct.

Not only did the court below erroneously decline to apply settled antitrust principles, but it also failed to recognize the boundaries on NRC's antitrust responsibilities mandated by Section 105(c). In its earliest decision construing Section 105c, the Commission stated:

> [W]e must emphasize that the specific standard which Congress required for antitrust reviews . . . has inherent boundaries. It does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves *licensed activities,* and not the electric utility industry as a whole. *If Congress had intended to enact a broad remedy against all anticompetitive practices throughout the electric utility industry, it would have been anomalous to assign review responsibility to the Atomic Energy Commission* [now NRC], *whose regulatory jurisdiction is limited to nuclear facilities.* It is the status and role of these facilities which lie at the heart of antitrust proceedings under the Atomic Energy Act. . . .
> [T]he hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license. This is a primary and predominant question which must pervade this proceeding.

Louisiana Power & Light Co., CLI-73-25, 6 AEC 619, 620-21 (1973) ("*Waterford II*") (first emphasis in original). *See Florida Power & Light Co.*, ALAB-665, Nuc. Reg. Rep. (CCH) ¶30,658 (1982); *Detroit Edison Co.*, ALAB-475, 7 NRC 752 (1978). In contrast, ALAB reviewed forty years of APCO's conduct and found a "pattern" of seven instances of allegedly anticompetitive behavior. The sole attempt of ALAB to relate the licensed activities to its conduct findings is the following:

> In this case, it can be expected that the addition of Farley to the applicant's generating capacity will over the years increase applicant's existing market dominance. Thus, a key consideration here is the action we must take to forestall that expectation from becoming reality.

13 NRC at 1105.

At no time did the court address APCO's contentions that the requisite nexus between the Farley Plant and this conduct had not been demonstrated. *Waterford II*, 6 AEC at 621. Rather, the court misconceived arguments made by APCO to the court concerning the necessity of relating past conduct as well as existing situations to activities under the license. It then restricted its discussion to whether the NRC had authority to consider APCO's past actions at all. 692 F.2d at 1368.

Section 105c(5) requires a finding that the "activities under the license" will "maintain" a "situation inconsistent with the antitrust laws." Logic demands that the situation found to be inconsistent with the antitrust laws be causally related to the operation of the licensed nuclear plant.[22] Congress was not concerned in the 1970 amendment to the Act with an electric utility's transmission or coordination practices which would exist regardless of the introduction of the nuclear plant. Rather, as testimony to the Joint Committee prior to the passage of Section 105c indicates, the "basic Congressional concern" was "over access to power produced by nuclear facilities," and the "decisive" competitive advantage which perceived low cost output from nuclear facilities would allegedly provide. *Waterford II*, 6 AEC at 620; *see* Hearings Pt. I at 118, 128, 133 (statements of Walker B. Comegys, Acting Asst. Attorney General, DOJ), 283 (statement of James T. Ramey, chairman, Atomic Energy Commission), 9 (statement of Comegys). This construction of Section 105c gives full effect to concern for nexus as well as Congressional intent that nuclear plant licensing not be delayed by an examination of "all competitive practices

[22]In a different, but analogous context, this Court has recently stated, "[o]ur understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms 'environmental effect' and 'environmental impact' in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effects at issue. This requirement is like the familiar doctrine of proximate cause from tort law." *Metropolitan Edison Co. v. People Against Nuclear Energy*, No. 81-2399, slip op. at 7 (U.S. Sup. Ct. April 19, 1983).

throughout the electric utility industry." *Waterford II*, 6 AEC at 620.

Necessity for demonstration of a causal connection was emphasized by both the Commission and DOJ.[23] Without such a required connection, NRC would be empowered to remedy situations inconsistent with the antitrust laws that would be maintained or created irrespective of the activities under the license.

None of the components of ALAB's "pattern" of conduct has the requisite tie to the operation of the Farley Plant, with the exception of ALAB's isolated finding of failure to offer joint ownership in that plant. To the contrary, the LB made the following crucial findings: (1) APCO's inconsistent conduct did not extend beyond 1972, 5 NRC at 1500; (2) The size disparity or market dominance of APCO over its competitor was not a result of anticompetitive conduct, 5 NRC at 1502-03; and (3) Delays in AEC's financing and construction of generating and transmission facilities were not caused by anticompetitive conduct of APCO, 5 NRC at 1503. The commercial operation of the Farley Plant was not licensed until 1977. Because this conduct terminated before the license issued and had no appreciable effect on APCO's market position, it lacked the requisite tie or nexus to the activities under the license.

APCO's lawful action in failing to offer joint ownership cannot form the tie between APCO's activities under the license and its unrelated, terminated conduct. DOJ and the Commission conceded before the court below that "a refusal to provide ownership access is not, in itself, an antitrust violation." Brief of Respondents at 53, *Alabama Power Co. v. NRC*. Under the precedents, this concession was well taken. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 276.

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[23] "Antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We would also consider the arrangements under which it would be built and supplied. No broader scope of review is contemplated, cognizant as we are of the need to avoid delays in getting atomic plants into operation." Hearings Pt. II at 366 (Comegys) (DOJ).

The court below also erred in affirming remedial license conditions which were not restricted to preventing activities under the license from maintaining a situation inconsistent with the antitrust laws. 692 F.2d 1369-70. ALAB's interpretation, 13 NRC at 1099, is contrary to NRC precedent,[24] the views of several NRC panel members,[25] and Section 105c(6) itself, which is triggered only by an affirmative finding under Section 105c(5).

Had ALAB properly construed Section 105c(6), license conditions requiring APCO to wheel non-nuclear power for AEC and municipally-owned distribution systems would not have been imposed. In addition to the total absence of relevant conduct findings,[26] the fact is that APCO's non-nuclear wheeling activities have had no effect on the market situation and, therefore, will not be maintained by the operation of the Farley Plant. *See Florida Power & Light Co.*, Nuc. Reg. Rep. at 30,178. The court's conclusion that "[t]he imposition of . . . conditions providing for access to [APCO's] transmission facilities is not an abuse of nor beyond that delegated discretion," 692 F.2d at 1370, is therefore erroneous.

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[24]*See Waterford II*, 6 AEC at 621 ("If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to . . . proposed forms of relief from them").

[25]The three LB members in this proceeding and the separate opinion of ALAB member Sharfman in *Toledo Edison Co.*, 10 NRC at 395-96 reflect a view contrary to that of ALAB. *See also Florida Power & Light Co.*, where an ALAB denied intervention in a licensing proceeding to a person seeking wheeling over FP&L's allegedly dominant transmission system on the ground "there is simply no explanation . . . of how FP&L's bringing on line [the nuclear unit] will act to maintain or entrench FP&L's alleged transmission monopoly").

[26]There was no finding by LB or ALAB that APCO had refused to wheel. Rather, the record shows that APCO has contracted to wheel power to both members of MEUA and the electric cooperatives operating in Alabama when requested so to do. 5 NRC at 831-32, 933.

III.

The Court Below Ignored Established Principles Governing Review Of Agency Decisions And Construction Of Agency Enabling Legislation.

A. The Court Below Erred in Affirming on a Rationale Different from that Articulated by NRC.

ALAB purported to apply traditional antitrust principles in defining the relevant market,[27] determining the existence of monopoly power,[28] evaluating allegedly anticompetitive behavior,[29] and rejecting APCO's proffered defenses.[30] Quoting its decision in *Midland*, ALAB rejected the contention that it was free to disregard settled antitrust principles:

> In our judgment, evaluation of business "conduct" in a case like this one, exploring charges essentially bottomed on Section 2 of the Sherman Act and its underlying policies, requires the application of the same monopolization and policy concepts as an investigation of an anticompetitive "situation." . . . An antitrust analysis of an applicant's conduct must therefore be undertaken in the context of the "situation" in which that conduct occurred—in other words, against the background structure of the relevant market.

13 NRC at 1046 (quoting *Midland*, 6 NRC at 912-13). Moreover, DOJ and NRC never even argued to the court below that traditional antitrust principles are inapplicable to nuclear power regulation. The lower court's surprising declaration that Section 105c does not call for or allow traditional antitrust analysis thus differs markedly from the rationale articulated by the agency.

This Court consistently recognizes that a court abandons its proper function when it affirms the agency's action on a ground

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[27] 13 NRC at 1046-51; 1060-61; 1066.

[28] *Id.* at 1068-69, 1072-73 ("Monopoly power has long been defined as the power to control prices or exclude competitors," *id.* at 1073).

[29] *Id.* at 1076.

[30] *Id.* at 1078-79 (application of *Noerr-Pennington* doctrine); *id.* at 1039-44 (impact of regulation on monopoly power).

different from that used by the agency.[31] As this Court noted in *SEC v. Chenery Corp.*,

> *If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which has not been made, a judicial judgment cannot be made to do service for an administrative judgment.* For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (emphasis supplied); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245-50 (1972). Since NRC purported to condition APCO's license to operate the Farley Plant because failure to do so would violate judicial interpretations of the antitrust statutes, the court should have reviewed the agency's decision in light of traditional antitrust standards. By affirming NRC on the far different rationale that Section 105c "does not call for or allow a traditional antitrust analysis," the court below ignored the command of *SEC v. Chenery Corp.* and *FTC v. Sperry & Hutchinson Co.*

B. The Lower Court's Construction of Section 105c Confers Excessive Administrative Discretion on NRC.

According to the lower court's construction of Section 105c, NRC is free to condemn conduct that is otherwise entirely compatible with antitrust principles. The court not only declared that NRC may condition licenses "in anticipation of situations which would not, if left to fruition, in fact violate any antitrust law," 692 F.2d at 1368, but also failed to suggest what "principles" should be applied by the agency. The court placed no limitation on NRC's authority to impose license con-

[31] *See Industrial Union v. American Petroleum Institute*, 448 U.S. 607, 631 n.31 (1980); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245-50 (1972); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *see also Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

ditions under Section 105c. This construction confers unbridled discretion on the agency and makes it impossible for the public and the courts to ascertain whether NRC has conducted its antitrust review in accordance with the standards prescribed by Congress.[32]

The lower court's construction of the statute also raises the spectre of an unconstitutional delegation of power to NRC. This Court recently reaffirmed the importance of construing statutes to avoid an open-ended grant of authority to an administrative agency. *Industrial Union v. American Petroleum Institute,* 448 U.S. 607, 646 (1980); *National Cable Television v. United States,* 415 U.S. 336, 342 (1974). By establishing "the antitrust laws" as the governing legal standard under Section 105c, Congress fulfilled its constitutional obligation to lay down an intelligible principle to guide NRC's exercise of discretion. The court below erred by failing to give effect to that guiding principle in its construction of NRC's antitrust review authority.

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[32]Congress was unquestionably concerned with the need for clarity and certainty in the antitrust review provisions of the Atomic Energy Act. Representative Hosmer of the Joint Committee noted that

> the bill [containing the 1970 amendments to the Act] in no way enlarges the substance of the antitrust review in any respect over the provisions of the existing law for commercial licenses. What we are trying to do is clear away procedural uncertainties in the manner in which both the Justice Department and the AEC are to proceed.

116 *Cong. Rec.* 31316 (September 20, 1970).

IV.

A Remedy Designed To Extend AEC's Government Subsidy Contravenes The Purposes Of Section 105c And The Antitrust Law

The court below recognized that ALAB's imposition of ownership conditions was "extreme," 692 F.2d at 1369, but nonetheless affirmed the remedy and explicitly approved ALAB's rationale for requiring joint ownership rather than unit power.[33] "Here the NRC has given the AEC ownership access to the new nuclear plants which . . . will allow the AEC to take advantage of congressionally conferred tax and other breaks it has as a rural electricity provider." *Id.* This attempt to promote free competition by extending AEC's tax and other congressionally conferred advantages ignores the deleterious effect of government subsidies on competition.

The legislative history of Section 105c in no way supports ALAB's effort to extend AEC's tax and financing advantages in the name of competition. The Joint Committee on Atomic Energy was advised by Roland W. Donnem, Director of Pol-

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[33]LB ordered APCO to sell unit power, stating that "there is no good reason to fashion a remedy deliberately designed to extend and multiply such preexisting advantages to a situation not expressly contemplated by Congress." 5 NRC at 1497.

In contrast, ALAB rejected unit power which would have allowed AEC to purchase Farley Plant power at APCO's cost, thereby neutralizing any competitive advantage APCO may have on account of Farley. In ALAB's words:

> [W]ere AEC to purchase power from the applicant on a unit power basis, it would lose the benefits of the advantageous financing otherwise available to it for the capital costs attributable to its share of the plant. . . . It also has certain tax advantages over investor-owned utilities.
>
> • • •
>
> Congress enacted legislation to provide capital at low interest rates to enable electric cooperatives to provide service to its customers at rates comparable to those enjoyed by the others.
>
> In the circumstances of this case, we cannot perceive how a unit power arrangement would promote free competition . . .

13 NRC at 1104 (footnotes omitted).

icy Planning, Antitrust Division, Department of Justice, that Section 105c remedies should not be used to confer unfair competitive advantages on subsidized power suppliers:

> [I]t may well be necessary in some circumstances to make explicit allowance for the competitive advantage conferred on municipally owned companies by virtue of their tax exempt status. Failure to make such allowances might confer an unfair competitive advantage on municipally owned companies who are permitted to participate, and thus hamper competition and perhaps discourage the very creation of large scale generating facilities.

Hearings, Pt. I at 10.

The Joint Committee reiterated these concerns when it advised Congress that Section 105c was not intended "to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system." Joint Committee Report at 4994.[34]

ALAB's use of Section 105c to extend AEC's subsidies is also at odds with traditional antitrust principles. This court has repeatedly recognized that antitrust remedies exist for " 'the protection of competition, not competitors.' ". *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Competition serves as a "consumer welfare prescription," *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), and not as an excuse to promote the inefficient. Antitrust law seeks fair price competition in open markets. *Id.* at 342.

These goals of antitrust policy are frustrated by the expansion of government subsidies. As this Court noted,

> [T]o the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free

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[34]ALAB misconceived the governmental policy of Congress in concluding that Congress intended to confer tax and financing advantages upon electric cooperatives to strengthen their competitive posture with other power suppliers. 13 NRC at 1105. *See* Appendix G, Legislative History of the Rural Electrification Act of 1936.

> public services, and freedom from taxation, state agencies merely redistribute the burden of costs from actual consumers to the citizens at large . . . Because there is no reason to assume that such agencies will provide retail distributions more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, 51 U.S.L.W. 4195, 4197-98 n.17 (U.S. Sup. Ct. Feb. 23, 1983).

ALAB's calculated effort to extend AEC's tax and financing advantages creates precisely these dangers, and provides no countervailing improvement in efficient market activity. Undisputed economic testimony establishes that AEC's subsidies are in no way attributable to its superior effort or efficiencies. *See* 5 NRC at 1504 n.38; Tr. 28140 (Pace)[35]; Tr. 1573-74 (Mayben); Tr. 24830-32 (Pace). The joint ownership remedy ordered below and upheld by the Eleventh Circuit was premised on the erroneous assumption that extension of these government subsidies would strengthen competition.

Joint ownership is particularly inappropriate because unit power gives APCO and AEC "essentially equal costs for the nuclear power" such that the Farley Plant neither adds to or subtracts from AEC's ability to compete. 5 NRC at 1502. Unit power therefore neutralizes any competitive advantage attributable to the Farley Plant without the corresponding injury to competition caused by extension of AEC's government subsidies.[36]

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[35]Dr. Joe D. Pace, senior vice-president of National Economic Research Associates, was APCO's economic expert.

[36]"[F]or every kilowatt of demand and every kilowatt hour of energy taken from the plant the buyer of unit power incurs exactly the same cost as the seller and plant owner." Tr. 28133 (Pace); *see* 5 NRC at 1502. Moreover, unit power would not create the same concerns of placing competitors in joint ventures together. *See Penn-Olin Chemical Co. v. United States*, 378 U.S. 158 (1964).

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby acknowledge that I have served three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and its accompanying Appendices by first class postage prepaid on the following counsel to the parties of record, this 2nd day of May, 1983.

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APPENDIX A

Opinion of the United States Court of Appeals,
Eleventh Circuit, Dec. 6, 1982.
[692 F.2d 1362]

ALABAMA POWER COMPANY,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and The United States of America, Respondents.

Nos. 81-7547, 81-7580 and 81-7846.
[692 F.2d 1363]

Petitions for Review of an Order of the Nuclear Regulatory Commission.

Before HILL and FAY, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

This is an appeal by the Alabama Power Company (Alabama Power) from a decision by the Atomic Safety and Licensing Appeal Board (Appeal Board) of the Nuclear Regulatory Commission imposing certain conditions on the issuance of an operating license to Alabama Power for the Joseph M. Farley Nuclear Plant, Units 1 and 2. The Appeal Board found that the unconditional licensing of these nuclear plants would create or

[692 F.2d 1364]

maintain a situation inconsistent with the antitrust laws and their underlying policies and, pursuant to Section 105(c) of the Atomic Energy Act of 1954, 42 U.S.C. § 2135(c) as amended 1979 (sic), ordered relief in the form of ownership access to the plants and access to Alabama Power's transmission facilities. After review of the record, the decision of the Appeal Board, and the Atomic Energy Act and its legislative history, we affirm the ordered conditions.

The Alabama Power Company is a wholly-owned subsidiary of the Southern Company, a public utility holding company that also owns Georgia Power Company, Gulf Power Company (which operates in the Florida panhandle), and Mississippi Power Company, all of which function under an interchange contract as the Southern Company Pool. Alabama Power generates, transmits and distributes electricity in all of Alabama except the eleven northernmost counties which are served by the Tennessee Valley Authority. Alabama Power gives retail service to residential, commercial and industrial customers. Alabama Power gives wholesale electricity service to sixteen municipalities with their own distribution systems (twelve of which comprise the membership of the intervenor Municipal Electric Utility Association of Alabama [MEUA]). Alabama Power also sells wholesale electricity to eleven rural distribution cooperatives, (ten of which are members of the other intervenor, Alabama Electric Cooperative [AEC]), and to AEC itself. AEC, in turn, is a generation and transmission cooperative whose membership is made up of four municipalities, two industrial mills and fourteen rural cooperatives. Neither the MEUA nor its members had generating capacity at the time of trial. AEC had a 137 megawatt production capacity and Alabama Power had over a 6,000 megawatt capacity.

The statutory foundation for this case is Section 105 of the Atomic Energy Act. By amending this Act in 1970, Congress gave the Nuclear Regulatory Commission (NRC) added duties in connection with the licensing of nuclear power plants. Specifically, the NRC was charged with considering the antitrust ramifications of its licensing actions. Section 105 (c) directs the NRC to review applications for permits to construct commercial nuclear power facilities to determine if the activities sought to be licensed would "create or maintain a situation inconsistent with the antitrust laws." 15 U.S.C. § 2135 (c). The antitrust laws incorporated in Section 105 (c) (5) are the Sherman Act, 15 U.S.C. §§ 1-7; the Wilson Tariff Act, 15 U.S.C. §§ 8-11; the Clayton Act, 15 U.S.C. §§ 12-27; and the Federal Trade Commission Act, 15 U.S.C. §§ 41-49. Under Section 105 (c) (6)

of the Atomic Energy Act, the NRC may rescind or refuse to issue a license if this result would follow. It may also attach appropriate conditions to a license to rectify the anticompetitive consequences of the licensed activity.

On October 10, 1969, Alabama Power Company filed with the Atomic Energy Commission, pursuant to Section 104 of the Atomic Energy Act, an application for a construction permit for a nuclear generating facility to be located in Houston County, Alabama. On June 26, 1970, Alabama Power filed an amendment to its application which requested authority to construct and operate a second, identical nuclear generating facility at the same location. These proposed nuclear facilities were originally designated the Southeast Alabama Nuclear Plant, but later were renamed the Joseph M. Farley Nuclear Plants, Units 1 and 2.

In December 1970, the Atomic Energy Act was amended by Congress to include a procedure whereby the Department of Justice is to notify the NRC if it determines that a prospective grant of a nuclear plant operating license might create or maintain a situation inconsistent with the antitrust laws. 42 U.S.C. § 2135 (c) (1). Pursuant to this section, the Department of Justice advised the NRC, in a letter dated August 16, 1971, that a hearing should be held to consider whether the activities of Alabama Power, under the license for the Joseph M. Farley Nuclear Plant, would have adverse antitrust ramifications.

In accordance with procedures set forth in 42 U.S.C. § 2135 (c) (3), the NRC gave notice that petitions for leave to intervene and requests for a hearing on the antitrust

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aspects of the application for the Joseph M. Farley Nuclear Plant should be filed within thirty days. Within this period, the AEC petitioned for leave to intervene in connection with these applications and requested a hearing. Also within the period the MEUA petitioned for leave to intervene and requested a hearing. Despite opposition from Alabama Power, the petitions to intervene and motions requesting hearings were granted.

During the course of the proceeding, the former Atomic Energy Commission, on August 15, 1972, issued construction permits for the Farley Nuclear Plant, Units 1 and 2. These permits were issued subject to the outcome of the antitrust proceeding and stated that they were granted without prejudice to any subsequent licensing action, including the imposition of appropriate conditions by the NRC.

The Licensing Board of the NRC conducted an extensive hearing beginning in December, 1974. Alabama Power, AEC, MEUA, the Department of Justice, and the staff of the NRC all participated in and made presentations at these hearings. The final evidentiary session was held in April, 1976. Thereafter, all above parties filed proposed findings of fact and conclusions of law and reply findings. Oral argument was heard in November, 1976. The scope of these hearings was very broad, and evidence was heard of alleged anticompetitive conduct on the part of Alabama Power occurring many years, even decades, prior to its 1969 license application. Of the numerous allegations of anticompetitive conduct, the Licensing Board found only five to be meritorious. It found that only the product market for wholesale power was relevant and that Alabama Power possessed monopoly power in this market. It rejected the contentions of Alabama Power's opponents that there were relevant markets in either the retail power or coordination services areas. 5 NRC at 879-894.

The five instances in which Alabama Power was found to have acted in an anticompetitive manner were as follows: (1) Alabama Power engaged in "unfair methods of competition" by its threats to terminate service to AEC should AEC successfully compete to replace Alabama Power as a supplier to Fort Rucker in Alabama, 5 NRC at 942-45; (2) certain contract provisions between Alabama Power and AEC and the municipal distributors were anticompetitive in regard to precluding alternate sources of supply, 5 NRC at 931-32; (3) part of a 1970 contract between Alabama Power and the Southeast Power Administration was an exclusive dealing arrangement and anticompetitive in nature and effect, 5 NRC at 937;

(4) between 1968 and 1972 Alabama Power refused to offer fair interconnection and coordination with AEC constituting anticompetitive conduct inconsistent with the antitrust laws, 5 NRC at 925; and (5) in the mid and late 1960's Alabama Power precluded small utilities, including AEC and municipal distributors, from regional economic coordination, 5 NRC at 946.

The Licensing Board found these examples of Alabama Power's anticompetitive conduct to have resulted in a situation inconsistent with the antitrust laws. It further concluded that activities under the nuclear license would maintain that situation. To remedy the antitrust concerns the Licensing Board imposed certain conditions on Alabama Power's license. Most importantly, it allowed AEC to purchase unit power from Alabama Power.

All parties appealed the Licensing Board's order to the Atomic Safety and Licensing Appeal Board of the NRC. The Appeal Board affirmed most of the License Board's findings but made some additional findings. Principally, the Appeal Board found that two additional markets were relevant and that Alabama Power had wrongly wielded monopoly power in both. These two markets were the retail power market and the coordination services market.[1] The Appeal Board also found two additional instances in which Alabama Power had acted in an anticompetitive manner.

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First, certain wholesale rate reductions in 1941, 1946 and 1950 were found to be anticompetitive in that they induced AEC not to build its own generating facilities. 13 NRC at 1077. Second, the Appeal Board found that Alabama Power had acted inconsistently with the antitrust laws by failing to offer AEC ownership participation in the Farley nuclear units. 13 NRC at 1086.

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[1]Coordination services include "various arrangements among utilities for reserve sharing, emergency exchange of power and energy, economy exchange of power and energy, maintenance scheduling, seasonal capacity exchange, and staggered construction." 13 NRC at 1047.

As a result of these findings, the Appeal Board rewrote the conditions imposed on Alabama Power's operating license.[2] Most

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importantly, it ordered that AEC be granted ownership interest in the Farley plants proportionate to their power needs.

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[2]The full text of the Appeal Board's conditions is as follows:

License Conditions Approved by the Appeal Board

The following license conditions are made a part of any licenses issued by the applicant for the Joseph M. Farley Nuclear Plant, Units 1 and 2:

1. Licensee shall recognize and accord to Alabama Electric Cooperative the status of a competing electric utility in central and southern Alabama.

2. Licensee shall offer to sell to AEC an undivided ownership interest in Units 1 and 2 of the Farley Nuclear Plant. The percentage of ownership interest to be so offered shall be an amount based on the relative sizes of the respective peak loads of AEC and the Licensee (excluding from the Licensee's peak load that amount imposed by members of AEC upon the electric system of the Licensee) occurring in 1976. The price to be paid by AEC for its proportionate share of Units 1 and 2, determined in accordance with the foregoing formula, will be established by the parties through good faith negotiations. The price shall be sufficient to fairly reimburse Licensee for the proportionate share of its total costs related to the Units 1 and 2 including, but not limited to, all costs of construction, installation, ownership and licensing, as of a date, to be agreed to by the two parties, which fairly accommodates both their respective interests. The offer by Licensee to sell an undivided ownership interest in Units 1 and 2 may be conditioned at Licensee's option on the agreement by AEC to waive any right of partition of the Farley plant and to avoid interference in the day-to-day operation of the plant.

3. Licensee will provide, under contractual arrangements between Licensee and AEC, transmission services via its electric system (a) from AEC's electric system to AEC's off-system members; and (b) to AEC's electric system from electric systems other than Licensee's. The contractual arrangements covering such transmission services shall embrace rates and charges reflecting conventional accounting and ratemaking concepts followed by the Federal Energy Regulatory Commission (or its successor in function) in testing the reasonableness of rates and charges for transmission services. Such contractual arrangements shall contain provisions protecting Licensee against economic detriment resulting from transmission line or transmission losses associated therewith.

4. Licensee shall furnish such other bulk power supply services as are reasonably available from its system.

AEC would, of course, pay the reasonable value for this interest. The Appeal Board concluded that only ownership access would alleviate the situation found inconsistent with the antitrust laws. 13 NRC at 1105.

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5. Licensee shall enter into appropriate contractual arrangements amending the 1972 Interconnection Agreement as last amended to provide for a reserve sharing arrangement between Licensee and AEC under which the Licensee will provide reserve generating capacity in accordance with practices applicable to its responsibility to the operating companies of the Southern Company System. AEC shall maintain a minimum level expressed as a percentage of coincident peak one-hour kilowatt load equal to the percent reserve level similarly expressed for Licensee as determined by the Southern Company System under its minimum reserve criterion then in effect. Licensee shall provide to AEC such data as needed from time to time to demonstrate the basis for the need for such minimum reserve level.

6. Licensee shall refrain from taking any steps, including but not limited to the adoption of restrictive provisions in rate filings or negotiated contracts for the sale of wholesale power, that serve to prevent any entity or group of entities engaged in the retail sale of firm electric power from fulfilling all or part of their bulk power requirements through self-generation or through purchases from some source other than licensee. Licensee shall further, upon request and subject to reasonable terms and conditions, sell partial requirements power to any such entity. Nothing in this paragraph shall be construed as preventing applicant from taking reasonable steps, in accord with general practice in the industry, to ensure that the reliability of its system is not endangered by any action called for herein.

7. Licensee shall engage in wheeling for and at the request of any municipally-owned distribution system:

(1) of electric energy from delivery points of licensee to said distribution system (s) ; and

(2) of power generated by or available to a distribution system as a result of its ownership or entitlement in generating facilities to delivery points of licensee designated by the distribution system.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of licensee, the use of

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which will not jeopardize licensee's system. The contractual arrangements covering such wheeling services shall be determined in accordance with the principles set forth in Condition (3) herein.

The Licensee shall make reasonable provisions for disclosed transmission requirements of any distribution system (s) in planning future transmission. By 'disclosed' is meant the giving of reasonable advance

When the NRC declined to exercise its discretionary review authority over the Appeal Board's decision, that decision became the final action of the NRC. This appeal resulted.[3]

II. Discussion.

On this appeal, we must decide two issues. First, whether the NRC, through its Licensing and Appeal Boards, correctly interpreted its congressional mandate under Section 105 (c) of the Atomic Energy Act in the scope of its inquiry and form of its analysis of the economic structure in the relevant power markets and the past conduct of Alabama Power. If so, the second issue is whether the statute authorizes the NRC to impose these conditions on Alabama Power.

A. Our task in deciding the first issue is one of interpreting statutory meaning and discerning legislative intent. The applicable part of Section 105 (c) reads as follows:

> Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, *and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws.* . . .

42 U.S.C. § 2135 (c) (5) (emphasis added).

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notification of future requirements by said distribution system (s) utilizing wheeling services to be made available by Licensee.

8. The foregoing conditions shall be implemented in a manner consistent with the provisions of the Federal Power Act and the Alabama Public Utility laws and regulations thereunder and all rates, charges, services or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

[3]Jurisdiction exists in this court pursuant to 42 U.S.C. § 2239 and 28 U.S.C. § 2342.

In the eleven years since this section was made applicable to nuclear licensing procedures, no federal court has reviewed a final order under section 105(c). Thus, interpretation of that statute presents an issue of first impression.

Alabama Power argues that the words "under the license" prohibit the NRC from considering the antitrust implications of any activity of a nuclear license applicant other than those directly arising from the activity sought to be licensed. They contend that the NRC overstepped its authority in looking past the direct effects of the nuclear plant on the present or prospective competitive situation, and in considering actions of Alabama Power which preceded the license application by many years. We do not agree with this argument.

A basic tenet of statutory construction is that the express language of a statute is the primary source of its meaning. In this instance § 105(c) directs the NRC to find whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws." . . . We believe that the word "create" directs the NRC to look forward to see if an anticompetitive situation could arise. But the word "maintain" must direct the NRC to take a careful look at the present—and the past—to see if an anticompetitive climate exists and to see if the applicant has acted in an anticompeti

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tive manner. "Size carries with it an opportunity for abuse which is not to be ignored when the opportunity is proved to have been utilized in the past." *United States v. Swift & Co.*, 286 U.S. 106, 116, 52 S.Ct. 460, 463, 76 L.Ed. 999 (1932). The amount of market power held by the applicant and the ways it has been used are relevant inquiries in determining whether there is a "situation" to maintain, and whether issuing this license will maintain it. The statute clearly calls for a broad inquiry and common sense does not allow interpretations to the contrary.

Alabama Power also argues that the NRC has "misapplied settled antitrust principles" in holding nuclear power license applicants to standards "inconsistent with the body of interpre-

tation developed by the courts." They argue that in finding anticompetitive conduct on the part of Alabama Power the NRC has not used standard antitrust analysis developed in the judicial interpretation of the antitrust statutes incorporated into the Atomic Energy Act. Alabama Power argues that activities which are not actual violations of the antitrust laws cannot be proscribed by the NRC. We do not believe that the statute calls for or allows a traditional antitrust analysis.

Under the direction of the statute to determine if activities under the license will *create* a situation inconsistent with the antitrust laws, we have noted that a forward look toward potential anticompetitive results is required. Before issuing a license it is impossible to predict with absolute certainty that activities under the license will create an anticompetitive situation. For this reason, Congress did not intend that the NRC limit its concerns to activities which are mature violations of the antitrust laws. Our best source of legislative history is *The Joint Committee on Atomic Energy's Report: Amending the Atomic Energy Act of 1954, as Amended, to Eliminate the Requirement for a Finding of Practical Value, to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities, and to Effectuate Certain Other Purposes Pertaining to Nuclear Facilities.* 91st Cong. 2nd Sess. 1970. The Joint Committee report squarely addressed this issue. It states,

> [t]he concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying those laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

Id. at 14.

The NRC is to look only for "reasonable probability" of violation. This command may result in the conditioning of li-

censes in anticipation of situations which would not, if left to fruition, in fact violate any antitrust law. But Congress intended this broad inquiry using all available information to prevent infringement on the antitrust laws in the nuclear power field.

We also note that the Joint Committee Report did not limit the NRC's inquiry to probable contravention of the antitrust laws, but included "or the policies clearly underlying these laws." Here again, a traditional antitrust enforcement scheme is not envisioned, and a wider one is put in place.

This interpretation of Section 105 (c) is consistent with Congress' basic policies toward the nuclear power industry. When the Atomic Energy Act was passed in 1954 it allowed private entry into the nuclear field for the first time. In the preceding years, scientific and technological nuclear know-how had been held exclusively by the government. This bank of information had been compiled over the years from research and development which had been financed by the American public. In turning this publicly held wealth of knowledge and scientific progress over to private enterprise, Congress felt that strict restraints should

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be included to prevent unfair advantage for those with the greatest resources. Those who had worked with the government were not to be the unbridled beneficiaries of the windfall head start they would have when private parties were allowed into nuclear power production. The unique potential and critical dangers of this new resource justified tight control to ensure safety and prevent unfair monopolization. See Adams, *Atomic Energy: The Congressional Abandonment of Competition,* 158[58] Colum.L.Rev. 55 (1955); Cosway, *Antitrust Provisions of the Atomic Energy Act,* 179[79] Vand. L.Rev. 12 (1958).

In strengthening the pre-licensing procedures with the 1970 amendment, Congress did not abandon these policies.

This analysis leads us to the contention of Alabama Power that the NRC has "misapplied settled antitrust principles" in

finding the relevant markets and monopoly power of Alabama Power. Those principles simply do not apply in the usual way to nuclear power regulation.

Alabama Power argues that we should not give great deference to the way the NRC interprets the statute under which it operates. We do not decide that question because we believe the NRC has interpreted the statute correctly.

The conclusions of the NRC concerning relevant markets in the wholesale, retail, and coordination services markets are amply supported in this extensive and thorough record. We affirm those findings and the holding that Alabama Power has exerted monopoly power in each of these markets that could and probably would lead to antitrust situations.

B. Remedy

The remedial scheme of this section is contained in Section 105 (c) (6). If the NRC makes affirmative findings under Section 105 (c) (5), it is then directed to

> also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, *and to issue a license with such conditions as it deems appropriate.*

Id. (emphasis added).

Alabama Power contends that by ordering ownership access to the new nuclear plants, the NRC exceeded its authority under the above section. We disagree.

Section 105 (c) (6) allows the NRC to consider factors other than the affirmative finding under 105 (c) (5). In leaving the remedy to the NRC's concept of "appropriateness," Congress intended that the NRC find a remedy to address its antitrust concerns. There has been no showing that any "other factors such as the need for power" work to contradict the conditions chosen by the NRC. In the Joint Committee on Atomic En-

ergy's report, *supra*, is the statement, "The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6)." *Id.* Here the NRC has given the AEC ownership access to the new nuclear plants which will amount to 4%-6%. This interest will allow the AEC to take advantage of congressionally conferred tax and other breaks it has as a rural electricity provider. No interference in the day to day operation of the plants or any right of severance is given AEC. These conditions do not hinder the public's need for power. (See footnote 2). On the contrary, they facilitate them. Further, and most importantly, the conditions alleviate the antitrust concerns resulting from the affirmative findings under paragraph (5). The conditions are specifically fashioned to address the anticompetitive situation which could arise from an unconditional license grant. While an affirmative condition requiring the sale of an ownership interest is indeed extreme, the approach of Congress reflects the uniqueness of legislative control over

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nuclear development. Congress determined the need for great expertise and wide powers. Both the responsibility and authority were granted to the Nuclear Regulatory Commission. The imposition of ownership conditions along with conditions providing for access to Alabama Power's transmission facilities is not an abuse of nor beyond that delegated discretion. We AFFIRM the remedy.

APPENDIX B

Section 105c of the Atomic Energy Act of 1954, as amended in 1970, reads:

a. Nothing contained in this Act should relieve any person from the operation of the following Acts, as amended, "An Act to protect trade and commerce against unlawful restraints and monopolies" approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled, "An Act to reduce taxation, to provide revenue for the Government, and for other purposes" approved August twenty-seven, eighteen hundred and ninety-four; "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October fifteen, nineteen hundred and fourteen; and "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" approved September twenty-six, nineteen hundred and fourteen. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

b. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing Acts, or to restrict free competition in private enterprise.

c. (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no

event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103: *Provided, however,* That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104b prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later.

(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceeding thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.

(6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection 105a.

(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 103, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid

unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: *Provided,* That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect. 42 U.S.C. 2135.